Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

NATIONAL SHIPPING COMPANY OF SAUDI ARABIA,

Petitioner,

vs.

MORAN TRADE CORPORATION OF DELAWARE, MORAN TOWING OF VIRGINIA, A DIVISION OF MORAN MID-ATLANTIC CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is it permissible to imply federal preemption of state and common law claims into OPA 90, 33 U.S.C. § 2701, *et seq.* when the Act expressly provides reliable indicia of the Congressional intent with respect to state and common law claims?

2. Can state and common law remedies, when expressly reserved in one section of an Act, be restricted in other sections of the same Act based on a court's interpretation of Congressional intent?

3. Did Congress preempt state and common law remedies in any manner in OPA 90?

LIST OF PARTIES

The parties to the proceeding sought to be reviewed are Petitioner, National Shipping Company of Saudi Arabia (NSCSA); Respondents, Moran Mid-Atlantic Corporation, Moran Trade Corporation of Delaware, Moran Towing of Virginia, Inc., a division of Moran Mid-Atlantic Corporation. NSCSA has no parent company and no nonwholly owned subsidiaries.

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Petitioner, National Shipping Company of Saudi Arabia (NSCSA) respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals for which review is sought (Appendix, 1a) is unreported. The Opinion of the District Court following the trial is reported at 924 F. Supp. 1436; 1996 A.M.C. 2604 (Appendix, 12a). The Order denying the motion to amend the judgment in the District Court is unreported (Appendix, 56a). The earlier District Court Order denying reconsideration of the decision dismissing the state statutory claim is also unreported (Appendix, 60a), as is the earlier District Court decision dismissing the state statutory claim (Appendix, 62a). The Order denying the Petition for a Rehearing in the Court of Appeals (Appendix, 73a) is unreported.

STATEMENT OF JURISDICTION

Petitioners seek review of an Opinion entered on September 9, 1997. The Order denying the Petition for Rehearing of that Opinion was entered on October 6, 1997. This Petition for Writ of Certiorari is filed within ninety days of the entry of the October 6, 1997 Order denying the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE III OF THE CONSTITUTION

Section 2, Clause 1 of the United States Constitution provides, in relevant part that:

> The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction.

OIL POLLUTION ACT OF 1990 PROVISIONS

Section 1002(a) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(a) provides in relevant part:

> (a) In General. — notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in Subsection (b) that result from such incident.

Section 1002(d)(2)(A) of OPA, 33 U.S.C. § 2702(d)(2)(A) states in pertinent part:

> Owner or operator of vessel or facility — If the act or omission of a third party that causes an incident occurs in connection with the vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in Section 1004 as applied with respect to the vessel or facility.

Section 1004(a) of OPA, 33 U.S.C. § 2704(a) states in relevant part:

> General Rule — Except as otherwise provided in this section, the total of the liability of a responsible party under section 1002 and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed — . . .
>
> (2) for any other vessel, $600 per gross ton or $500,000, whichever is greater . . .

Section 1018 (a) of OPA, 33 U.S.C.§ 2718(a) provides in pertinent part:

> Preservation of State Authorities; Solid Waste Disposal Act. — Nothing in this Act . . . shall — . . .
>
> (2) affect or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et. seq.) or State law, including common Law.

STATEMENT OF THE CASE

A. District Court Jurisdiction

Jurisdiction of the United States District Court, Eastern District of Virginia was based on 28 U.S.C. §§ 1331, 1332, and 1333.

B. Procedural History

On December 1, 1993, the tug HARRIET MORAN, owned

by respondent Moran Trade Corporation of Delaware collided with the M/V SAUDI DIRIYAH, a vessel owned by Petitioner National Shipping Company of Saudi Arabia (NSCSA). As a result of the collision, about 9,000 gallons of fuel oil were spilled into the Elizabeth River. NSCSA took responsibility for the spill, cleaned it up and settled most of the claims asserted by third parties. In March, 1995, NSCSA filed a complaint, later amended, against Respondents, arguing that the collision was caused by Respondents' negligence and asserting four different theories of liability: (1) General Maritime Law; (2) Virginia's State Water Control Law; (3) Virginia Common Law; and (4) The Oil Pollution Act of 1990, 33 U.S.C. § 2701, *et seq.* (OPA).

On August 14, 1995, the District Court entered an Order dismissing Count II of the complaint which sought to recover the response costs and third party settlement claims pursuant to Virginia State Water Control Law. On September 18, 1995, the Court denied the Petitioner's motion for reconsideration or clarification of the aforementioned Order.

The case was tried non-jury in January, 1996 and the Court issued an Order dated April 25, 1996 finding Respondents Moran solely responsible for the collision that caused the oil spill but limiting Moran's liability to $500,000 pursuant to OPA 90. The Court found that Petitioner NSCSA's liability to others arose solely under OPA 90 and accordingly NSCSA was limited to claiming under that law and was preempted from claiming under state law or common law. The Circuit Court affirmed this decision.

C. Background

As former Senate Majority Leader George Mitchell has explained, efforts to enact a comprehensive Federal Oil Pollution Law had been stymied for many years due to a disagreement

about whether such a law should preempt state law regarding oil spills.[1]

In 1989 and early 1990 there were a number of major spills around the country which led to the passage of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2701, *et seq.* Although the Act sets forth a comprehensive Federal liability scheme regarding discharges of oil onto the navigable waters, it specifically reserves the right to claim under state law and common law and it leaves the individual states free to enact such pollution liability laws as they deem necessary.[2] This is one of the main and most controversial features of the Act.[3]

A second chord running through OPA is the notion that the party responsible for the spilling vessel should cleanup the oil and pay all claims in the first instance. Thus, the amounts paid by the responsible party to remove the oil are credited to its Limitation Fund.[4] 33 U.S.C. § 2704(a). If a responsible party fails to cooperate and assist in the oil removal activities after being requested to do so, the responsible party loses it's right to limit liability. 33 U.S.C. § 2704(c)(2). The Coast Guard is required to officially notify the party responsible for the oil spill of its designation as the source of the spill. The responsible party has five days to deny this designation and if there is no denial, the responsible party must begin advertising the procedures to

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1. Mitchell, *Preservation of State and Federal Authority under the Oil Pollution Act of 1990*, 21 Envtl. L. 237 (1991).

2. 33 U.S.C. § 2718

3. *See* Mitchell, *supra*, n.1.

4. This was not allowed under the Federal Water Pollution Control Act, *United States v. Dixie Carriers, Inc.*, 736 F.2d 180, 183 (5th Cir. 1984).

submit claims. 33 U.S.C. § 2714. All claims must be submitted to the responsible party in the first instance. 33 U.S.C. § 2713(a). Even if it is the position of the responsible party that the spill was caused solely by a third party, the responsible party must still pay the removal costs in the first instance. 33 U.S.C. § 2702(d)(1)(B)(i).[5] Thus, there is an overriding intent in OPA that the responsible party for the vessel spilling oil should immediately begin to cleanup the oil and pay claims.

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5. At the time the law was enacted, the sponsors left no doubt that the intent was to force the spilling vessel to cleanup the oil and pay claims immediately:

> Our goal is to make certain that, when a spill occurs, the polluter — not the taxpayer — will pay; and to make certain that fishermen and property owners and hotel operators and others hurt by a spill will be compensated — not 7 years from now, not after lawyers have taken half or three-quarters of the money, but quickly and fairly. 136 Cong. Rec. H6931 (daily ed. August 3, 1990) (statement of Rep. Studds)

> The conference agreement is a strong statement that we should never again be caught so unprepared. It tries to ensure that industry and government are prepared for oil spills, and that they respond quickly and effectively to contain them and minimize damage.

> To make sure that industry does clean up its spills, the agreement requires ship and facility owners to prepare response plans that ensure to the maximum extent practicable sufficient private resources to deal with a worst-case spill. 136 Cong. Rec. S11537 (daily ed. August 2, 1990) (statement of Sen. Baucus)

REASONS FOR GRANTING THE WRIT

The Opinion in *National Shipping* ignores these two overriding themes in OPA and creates a dilemma for owners and admiralty lawyers representing vessels which spill oil. If those responsible for the vessel spilling oil accept responsibility pursuant to OPA, under the reasoning of the court below, the owner could be waiving any state or common law remedies for contribution or indemnity. This creates an incentive to try to get the local authorities to see that "*State Law* [is] . . . *imposed to force* [the owner] *to cleanup the spill or to compensate its victims.*"[6] This would be the only safe way to avoid preemption and preserve the indemnity and contribution claims. One possible way to achieve this goal would be to take no action until ordered to do so by the state or local authorities. This is contrary to OPA but is unfortunately one of the few options available under the lower court's decision.

The lower court's interpretation of 33 U.S.C § 2718 is the root of the problem. On its face, this section is not confusing. It reads in relevant part as follows:

> Nothing in this Act . . . shall
>
> > (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under . . . State Law, including common Law.

This section was the basis for Petitioner's claim that it had indemnity and contribution actions under Virginia State and common law regardless of any limitation contained in OPA or anything else in the Act. This is the plain meaning of the words

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6. *National Shipping*, Appendix, 10a.

of § 2718 and a view largely shared by the commentators on OPA.[7]

Although the Respondents have obligations and liabilities for contribution and indemnity under state and common law, the lower court found that OPA shielded or protected the Respondents from these obligations and liabilities. The court made the implied finding that the Petitioner was preempted from asserting these state and common law claims due to the limitation amounts in OPA. The court held that state and common law could be used in contribution and indemnity cases only if the underlying obligation arose exclusively under state or common law. Thus, the Petitioner was precluded by OPA from bringing a state or common law action because the liability for the oil spill arose "solely" under OPA.

The analysis in *National Shipping* is further complicated by the court's interpretation of 33 U.S.C. § 2704, the section dealing with the effect of a vessel's Limitation Fund. Although

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7. *See, e.g.*, Rodriquez & Jaffe, *The Oil Pollution Act of 1990*, 15 Tulane Mar. L.J. 1, 18 (1990) ("additional state liabilities are not subject to limitation either under the Act itself, or pursuant to the Limitation Act."); Morgan, *The Oil Pollution Act of 1990*, 6 Fordham Envtl. L.J. 1, 6 (1995) ("Thus, OPA's liability limits provide no protection for responsible parties sued under State Law"); Swanson, *Federalism, the Admiralty and Oil Spills*, 27 J. Mar. L. & Comm. 379, 415 (1996) ("Under OPA and case law, each state is apparently allowed to fashion its own liability rules beyond those established by the Federal Law. These state statues may be enforced even when they contravene the general Maritime Law."); Wyatt, *Navigating the Limits of State Spill Regulations*, 8 U.S.F. Mar. L.J. 1, 12 (1995) ("OPA permits supplementation of its liability scheme with 'any additional liability or requirements,' which seems to permit the states not only to enlarge liabilities but also expand the categories of responsible parties to include all participants in the risk-creating activity") (footnotes omitted); McCurdy, *OPA Overview & Relationship to Other Laws*, 5 U.S.F Mar. L.J. 439-441 (1993).

difficult to follow, it appears that the key figure is not the Limitation Fund of the vessel at fault for the spill but the Limitation Fund of the blameless vessel. Under this reasoning, if the M/V SAUDI DIRIYAH had an OPA Limitation Fund of $500,000, under the exact same facts, it would be entitled to recover in full from the defendants. Using this analysis, it is the blameless vessel's tonnage that is the determining factor on whether or not there is preemption of state and common law. If the blameless vessel has a low limitation figure under OPA, there is no preemption and a party may claim under state and common law. However, as in the present case, if the blameless ship owner's Limitation Fund is greater than the cost of the cleanup, the owner cannot use state or common law to claim against the vessel which caused the oil spill.[8]

It is important that the confusion in the law engendered by *National Shipping* be cleared up as soon as possible. In 1988, the country imported 6 million barrels of oil per day and there were about 3,800 port calls by oil tankers.[9] Either these tankers used tugs to assist in docking or anchored and then off loaded the oil to barges propelled by tugs. Most oil spills involve more than one vessel and the uncertainty about when a party can use

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8. One commentator, who specializes in marine pollution cases, thought the lower court used an economic rationale for it's decision and then made a determination that the larger vessel derived a greater economic benefit from the operation. Gonyer, *Six Years Before the Mast*, 9 U. San Fran. Mar. L.J. 105, 120-122 (1996). If this is the underpinning for the decision, it is certainly contrary to the plain meaning of OPA and the Congressional intent behind the law.

9. S. Rep. No. 99 at 3, 101st Cong., 2d Sess., *reprinted in* 1990 U.S.C.C.N. 751. While spills from tankers or barges pose the greatest environmental risk, in the present case, the M/V Saudi Diriyah was not a tanker and yet the clean up costs were far higher than the tug's Limitation Fund. There are hundreds of similar tug assisted movements to the one in this case each week throughout the country.

state law might delay a cleanup and aggravate environmental damages after a spill. Spills involving more than one vessel generate a substantial amount of litigation[10]. Indeed, the four largest spills since the enactment of OPA have involved tugs and barges[11]. The barges are larger and have higher Limitation Funds than the tugs. The tugs are manned, provide the propulsive force, and are usually to blame for the collision, grounding, or other casualty that causes the oil spill. Since the oil would come from the barge or tanker, the barge or tanker owner would be the responsible party and would have a claim over against the tug. The tug's Limitation Fund under OPA is much smaller and the barge or tanker owner will realize that even if it is blameless, it might not recover the cost of the clean up due to the OPA

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10. *See, e.g., United States v. West of England Ship Owners Mut. Prot.*, 872 F.2d 1192 (5th Cir. 1989); *United States v. Hollywood Marine, Inc.*, 625 F.2d 524 (5th Cir.), *cert. denied*, 451 U.S. 994 (1980); *United States v. LeBeouf*, 621 F.2d 787 (5th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981); *Frederick E. Bouchard, Inc. v. United States*, 583 F. Supp. 477 (D. Mass 1984); *United States v. M/V Big Sam*, 681 F.2d 432 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); *United States v. T/B Arcadian 95*, 714 F.2d 470 (5th Cir. 1983); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979); *Montauk Oil Transp. Corp. v. Tug El Zorro Grande*, 54 F.3d 111 (2d Cir. 1995); *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *Gaspar v. United States*, 460 F. Supp 656 (D. Mass. 1978); *Golnay Barge v. Shinoussa*, 1991 A.M.C. 2930 (S.D. Tex. 1991).

11. TAMPA BAY SPILL — *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.*, 51 F.3d 235 (11th Cir. 1995); PUERTO RICO SPILL — *United States v. Rivera*, 942 F. Supp 732 (D.P.R. 1996), *rev'd*, 1997 Lexis 34186 (1st Cir. 1997) (*en banc*); RHODE ISLAND SPILL — *In re Odin Marine Corp.* 96 CV. 5438 (S.D.N.Y.) (decision of Judge Stein August 7, 1997); TEXAS SPILL — Olafson, *Stricken Barge Spurting Oil off Bolivar*, Houston Chronicle, March 19, 1996 at 11; Olafson, *Gooey Mess Spreads Far, Fast*, Houston Chronicle, March 20, 1996 at 23; Olafson, *Congealed Oil Spares Galveston*, Houston Chronicle, March 21, 1996 at 33.

limitation amount for the tug unless it has the grounds to assert a claim under state or common law. This is the lesson that *National Shipping* sends out to vessel owners and those who practice marine pollution law.

There is a fundamental conflict between the holding in *National Shipping* and the First Circuit Court's decision in *In re Ballard Shipping*, 32 F.3d 623 (1st Cir. 1994). In *Ballard*, the court held that

> an injured party may have claims arising from a single accident both under federal maritime law and under state law, whether legislation or common law.

Ballard, supra at 626. Even though the First Circuit Court in *Ballard* affirmed the dismissal of the federal claims, it allowed state law claims arising from the same incident to go forward. It relied in part on § 2718(a) of OPA which allows additional state law liability. The spill in *Ballard* occurred before OPA was enacted but the court found that the non-retroactivity of OPA was irrelevant. In contrast, the Fourth Circuit Court in *National Shipping* made a determination the Petitioner's liability arose solely under OPA and held that since this liability arose under OPA 90, the Petitioner could not claim under state or common law due to the preemption in OPA 90. In other words, the Petitioner could have only one claim up to its Limitation Fund and that claim was under OPA.

The holding in *National Shipping* is also a clear departure from the recent trend of Supreme Court and lower court cases involving preemption of state and common law in the pollution area. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), this Court sustained a Florida statue that imposed no fault liability on vessel owners and operators for damages caused by oil spills in territorial waters and rejected a maritime

law preemption challenge. Similarly, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), the Court held that state air pollution laws were a classic example of police power and that the state could act in such areas of interstate commerce and maritime activity concurrent with the federal government. Lower courts have followed this trend. Thus, in *Ballard, supra*, the court held that the Rhode Island State Law was not preempted by applicable Federal Law. OPA 90 did not apply to this case although the court left little doubt that OPA 90 compelled it to allow the claims under Rhode Island Law. In a case interpreting Section 2718 of OPA, a New York court held that a New York pollution statute was not preempted by OPA. *Berman Enterprises, Inc. v. Jorling*, 793 F. Supp. 408, 414-16 (E.D.N.Y.), *aff'd*, 3 F.3d 602 (2d Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994). In another case interpreting Section 2718 of OPA, the District Court in Seattle held that the OPA 90 non preemption language applied to Washington State regulations which governed tanker operations and other maritime subjects. *Intertanko v. Lowry*, 947 F. Supp 1484 (W.D. Wa. 1996).

A large part of this Court's admiralty docket over the past few years has dealt with the conflict between State Law and Federal Admiralty Law; both statutory and judge made Admiralty Law. Apparently, there remains confusion in some courts about when State Law is preempted by Federal Law. In certain admiralty cases, this Court has made it clear that there is no preemption. *See, e.g., Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619 (1996); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Chick Kam Choo v. Exxon Corp.* 486 U.S. 140 (1988). In other admiralty cases, the Court has held that State Law cannot be used in certain admiralty actions. *See, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). This Court has recognized that this choice of law puzzle is very difficult and

> it would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.

American Dredging, *supra*. at 452. Justice Ginsburg repeated Justice Scalia's quote in *Yamaha, supra* and then wrote "we attempt no grand synthesis or reconciliation of our precedent today . . ." and left many questions for another day. *Yamaha*, *supra* at 626 n.8. That day has arrived for this area of the law. Although OPA 90 and prior Supreme Court cases dealing with preemption in pollution cases may seem to draw a clear, bright line on the choice of law issue, this line is not discernible in *National Shipping* and the holding in *National Shipping* will spawn other cases which will blur the line even further.

This Court has recognized the importance of the preemption issue and the need for clear guidelines about when Federal law will preempt state and common law in statutory claims. The Court has granted certiorari in *Lewis v. Brunswick Corp.*, 97-288. The questions presented in that case deal with the implied preemption of state common law claims under the Boat Safety Act, 46 U.S.C. § 4301, *et seq.* The decision in *National Shipping* deals with the implied preemption of state and common law claims under OPA and raises many of the same issues as *Lewis* in the maritime oil pollution area. The main difference is that in the maritime pollution area, the unsettled law could cause a delay in cleaning up a large spill and could aggravate environmental damage. This uncertainty should be resolved prior to the next large oil spill which history shows us, is sure to occur.

CONCLUSION

1. For the forgoing reasons, this Court should grant the petition and exercise its jurisdiction to resolve the confusion

about the preemption of state and common law in a maritime oil spill case.

2. In the alternative, Petitioner prays for a summary reversal of the decision below.

3. In the alternative, Petitioner requests that certiorari be granted and *National Shipping* be identified as a companion case to *Lewis v. Brunswick Corp.*, 97-288 because of the similarity of issues involving the implied or explicit preemption of state law by federal statutes dealing with maritime matters.

4. In the alternative, Petitioner prays that the Court hold the case without action until *Lewis v. Brunswick Corp.* is decided and then either grant certiorari to consider any issues not decided in that case or grant certiorari and vacate and remand in light of the decision in *Lewis v. Brunswick Corp.*

Respectfully submitted,

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